

Antitrust Merger Enforcement Update: One Year into the Trump Administration

Article By:

Jon B. Dubrow

In Depth

At the one year anniversary of the Trump administration, antitrust merger enforcement remains similar to the Obama administration, but it is still early to judge given the delays in antitrust appointments and given the DOJ's lawsuit against the vertical AT&T/Time Warner transaction, the first vertical merger litigation in decades. Below are a few of the recent developments that have impacted merger enforcement by the Federal Trade Commission (FTC) and Antitrust Division of the US Department of Justice (DOJ), as well as European regulators:

US Updates

DOJ Leadership in Place; Three FTC Vacancies Remain Unfilled. The new head of the DOJ Antitrust Division just started in October, while we wait for the Senate to confirm Trump's four recent nominations to fill FTC Commissioner roles. It is unclear whether the DOJ's challenge of AT&T/Time Warner represents a shift towards more populist antitrust enforcement or is simply a result of politics.

Increased Skepticism Toward Behavioral Remedies for Vertical Transactions. In addition to the DOJ challenge to AT&T/Time Warner, DOJ Assistant Attorney General Makan Delrahim announced in a speech that the DOJ would seek to reduce the number of consent decrees with behavioral remedies and return to a focus on structural relief to remedy mergers. Historically, the DOJ has imposed behavioral remedies to address "problematic" vertical transactions. A similar FTC enforcer has stated similar, although less extreme views.

Both the DOJ and the FTC Continue to Be Very Active. The FTC and the DOJ are still requiring remedies for transactions reducing the number of competitors from four to three or fewer and transactions that result in high combined market shares. Over the last year, the agencies have challenged a number of transactions (e.g. Tronox/Cristal, Sanford Health/Mid Dakota Clinic, Draft Kings/Fan Duel). The agencies have also required structural divestitures in a number of transactions. (e.g. Agrium/Potash, CR Bard/Integra Life, TransDigm/Schroth).

Rise in Number of Post-Closing Challenges. A number of recent FTC and DOJ challenges have come after the merging parties closed the transactions. These cases have involved both non-reportable deals and reportable deals where issues were not spotted during the initial waiting period.

State Attorneys General Stepping in to Fill Void with FTC Deadlock. With the FTC stuck at two commissioners, States Attorneys General (AGs) have challenged cases where it appears the FTC commissioners may have disagreed about the need for a challenge. In two recent challenges, the Washington State and California AGs challenged mergers in the health care and petroleum terminals industries, respectively, even though the FTC did not challenge them.

Courts Hold Parties to High Standards When “Litigating the Fix.” In assessing one of the recent health insurance mergers, the court called into question the viability of the divestiture assets to operate as a standalone business. This signals that courts will continue to require divestitures which ensure the buyer will compete effectively post-closing.

Length of Reviews for Global Transactions Increasing. Global transactions are taking longer than ever, roughly 11 months on average, to obtain clearance from antitrust regulators. MOFCOM, India, and Brazil remain important regulators in addition to the United States and Europe.

European Updates

European Commission (EC) Continues to Clear Most Transactions in Phase 1. In 2017, 380 transactions were notified to the European Commission, 353 (93 percent) of which were approved in Phase 1 (and 73 percent under the Simplified Procedure). The EC initiated 7 Phase 2 investigations (just under 2 percent of all deals). Two of these deals were cleared in 2017 with remedies, and two were prohibited. The average duration of investigations cleared with remedies in Phase I was 7 months. EU merger investigations that went to Phase II took an average of 15 months from announcement to clearance.

EC Increasing Interest in Innovation Markets. The EC’s challenge of the Dow/DuPont merger, which resulted in significant divestitures of research and development assets, and statements by Commissioner Margrethe Vestager suggest that the EC will focus on innovation markets going forward. The EC’s remedies in Dow/DuPont stand in contrast to the US DOJ’s statement that it did not have innovation concerns when it cleared the merger.

EC Interested in Competitive Implications of Common Shareholdings by Institutional Investors. In its Dow/DuPont analysis, the EC stated that significant common shareholding likely “negatively affect[s] the benefits of innovation competition.” This statement, along with a recent economic study on this issue, suggests that the EC is taking a greater interest in the potential implications of common ownership.

EC Reviews Cases Where Parties Provide Incomplete Information in Merger Notification. The EC recently fined Facebook €100 million for providing misleading information in the EC’s review of its acquisition of Whatsapp. Several other similar cases suggest this will be an area of interest moving forward.

Increased Focus on Gun-Jumping Violations in Europe. In France, telecom operator Altice was fined €80 million for procedural and substantive gun jumping. In addition, the EC fined Marine Harvest EUR 20 million for procedural gun jumping—which was upheld on appeal by the EU General Court.

National Law Review, Volume VIII, Number 30

Source URL: <https://natlawreview.com/article/antitrust-merger-enforcement-update-one-year-trump-administration>